IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~426~~ 14

EUGENE DENNIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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INDEX

CITATIONS

Cases:

Miscellaneous:

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I

The Jury Issue.

The Government's brief (pp. 13-15) misconceives the nature of petitioner's challenge to all talesmen who were government employees. The petitioner contends that he was deprived of a fair and impartial trial in violation of the Sixth Amendment because the government employees, under the circumstances of this case, were disqualified *as a matter of law* from serving as members of this jury. The issue here, therefore, is not whether government employees may in general sit in judgment in cases prose-

cuted by the Government, nor whether opportunity was afforded counsel to inquire on voir dire into the juror's prejudices. The issue is: May government employees subject to the terms and provisions of Executive Order 9835 serve upon a jury in a criminal trial prosecuted by the Government for contempt of the House Committee on Un-American Activities, where the action has been initiated by the House Committee on Un-American Activities and the defendant is the General Secretary of the Communist Party? The Government's brief in opposition appears to have overlooked the following considerations:

a) In *Frazier* v. *United States,* decided by this Court on December 20, 1948 (four Justices dissenting), a case involving a violation of the Narcotics Law, the sole issue before the Court was whether government employees, without more, could be disqualified from sitting on a jury in a criminal case prosecuted by the United States. The situation here is far different. Here something more, of a drastic nature, did occur. On March 21, 1947, the President of the United States issued Executive Order 9835 "Prescribing Procedures For The Administration of An Employees Loyalty Program In The Executive Branch Of The Government." Investigation of the loyalty of all government employees was ordered with the specific requirement that among the "pertinent sources of information" to which the investigators were to refer were the "House Committee on Un-American Activities files" (Executive Order 9835, Part I, Section 3e). The activities and associations of government employees which could be considered in connection with the determination of disloyalty included the following:

"Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, *communist*, or *subversive*, or as

having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (Executive Order 9835, Part V, Section 2f).

When there is considered under what circumstances Executive Order 9835 was issued (R. 31 et seq.) and the wide publicity which surrounded the loyalty investigations of government employees (see Andrews, B., Washington Witchhunt, 1948); when there is considered the enormous consequences to government employees which flow from the finding of disloyalty under Executive Order 9835; when the testimony of the Chairman of the House Committee on Un-American Activities, John Parnell Thomas, is recalled with his "subversive list" of over a million names (R. 189) and the Committee's rule permitting "agents of the Government to come and see our files"—it appears clear that no government employee could be a "fair and impartial" juror within the intendment of the Constitution. As Mr. Justice Jackson stated of government employees in the *Frazier* case:

"• • • Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger

in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to '* * * crook the pregnant hinges of the knee where thrift may follow fawning.'"

b) In the light of the above, it is clear that no amount of inquiry by counsel nor assurances given by the talesmen could remove the bias inherent in these proceedings. It is unreasonable to assume that any government employee would ever admit his belief that any action taken by him at the trial would subject him to a loyalty investigation. The significant facts are that a majority of the jury were composed of government employees subject to the Loyalty Order; that the charge in the indictment was contempt of the House Committee on Un-American Activities; that the jury were so reminded by the Court and the United States Attorney throughout the trial; that the Chairman of the Committee and another member, Karl E. Mundt, as well as the Chief Investigator, Robert E. Stripling, testified before the jury; and the jury knew and were informed time and again that the defendant was a principal officer of the Communist Party. Under these circumstances was it reasonable to assume that a government employee could render a "fair and impartial" verdict? If he held out for a verdict of acquittal, how could he ever be sure that a fellow juror would not report that fact to his agency, especially when under Executive Order 9835 "an investigative agency may refuse to disclose the names of confidential informants" (Part IV, Section 2). The case here presents the "combination of circumstances" to which the majority of this Court referred in the

Frazier case. Indeed, "the cards were stacked from the beginning."

The Government's argument that "the jurors were carefully questioned to determine that there was no bias" (p. 15) overlooks the events which occurred at the trial. Shortly after the jury was sworn, an alternate juror asked leave to speak to the Court (R. 125). He informed the Court and counsel that "this jury was sitting at the *Barsky* trial as spectators, more or less, and they heard, I think, this very argument that we were expelled from the room for—the question of law as to whether the Committee had the right to issue a subpoena" (R. 126). As counsel for the petitioner reminded the Trial Court (R. 128), not one juror had volunteered the information that he had listened to the arguments in the *Barsky* case, despite the fact that they had been, as the Government asserts, "extensively questioned on the voir dire for any signs of prejudice" (p. 14). To assume under such circumstances that a government employee would reveal his fear of the impact of Executive Order 9835 upon his verdict is to flout reality and arbitrarily determine impartiality where none can exist. Indeed, government employees ought not to be required under such circumstances to have to search their consciences to to determine their ability to withstand the pressures to which such an order subjects them, consciously and subconsciously. Clearly, in a case such as this, the strong possibility of fear and bias on the part of government employees is sufficient to disqualify them within the purview of the Sixth Amendment.

c) Moreover, the House Committee on Un-American Activities, as the Court advised the jury (R. 335), was allegedly engaged in investigating "subversive" and "Un-American" propaganda. Basically, its inquiry was directed to the loyalty of citizens and the peti-

tioner, the General Secretary of the Communist Party, was charged with contempt of the said Committee. With such terms as "sympathetic association", "subversive", and "disloyal" completely undefined, no government employee could be sure that his verdict of acquittal would not enmesh him in the web of Executive Order 9835.

It is submitted that the issue here is one of great public importance involving as it does a basic aspect of the administration of justice in the federal courts and should be passed upon by this Court. If it is error to refuse to permit an inquiry upon cross-examination as to where a witness lives for the purpose of showing to a jury that the witness is under detention by the Government and therefore biased (*Alford* v. *United States*, 282 U. S. 687, 1931), it is clear error, it is submitted, for government employees, subject to the terms of Executive Order 9835, to sit in judgment in an action where a verdict of acquittal may be tantamount in the opinion of government officials to evidence of disloyalty.

II

The validity of the statute creating the Committee on Un-American Activities.

The Government declines to meet the petitioner on the merits of this issue (pp. 8-9). We respectfully refer the Court to our arguments contained in the petition for the writ of certiorari and the brief in support thereof (pp. 13, 16-19, 26, 28-29, 30-35). The Government does not deny the public importance of the issue nor does it disagree with the view that "there is a serious need for this Court to exercise its historic function of interpreting the fundamental document" (pet. p. 17). To the many voices cited in our petition (p. 17) calling for a determination

by this Court of the fundamental issue herein involved we would add the voice of Alexander Meikeljohn in his recent treatise, Free Speech and Its Relation to Self-Government (N. Y. 1948):

> "May a teacher venture to suggest that the time has come when the court, as teacher, must declare, in unequivocal terms, that no idea may be suppressed because someone in office, or out of office, has judged it to be 'dangerous?'"

The argument that the petitioner is without standing to challenge the authority of the Committee is without merit. The gravamen of the Government's entire brief appears to be that the petitioner may not challenge the authority of the Committee and yet may be convicted for resisting its authority. The decisions of this Court are to the contrary.

In *McGrain* v. *Daugherty*, 273 U. S. 135 (1927), the witness failed and refused to appear after subpoenas served upon him, but this Court did not doubt the right of the witness to raise the question of the authority of the Committee when he was arrested and tried, although the question was decided against him. This Court stated that the two Houses of Congress are not "invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied" (p. 173). See also, *Sinclair* v. *United States*, 279 U. S. 263 (1929).

Where a statute which requires the issuance of a license to carry on a business is invalid on its face, a person is not required to make an application for such a license in order subsequently to raise the question, but he may disobey the statute and raise the invalidity of the statute in an action brought to enforce its penalties. *Smith* v. *Cahoon*, 283 U. S. 553, 565 (1931). The rule is the same in free speech cases, *Lovell* v. *Griffin*, 303 U. S. 444 (1938). "As the ordinance is void on its face, it was not necessary for appellant

to seek a permit under it. She was entitled to contest its validity in answer to the charge against her" (p. 452).

An order of a Court restraining a union organizer from soliciting membership in a union without first obtaining an organizer's card as required by a state statute was disobeyed by the union organizer. This Court, in upholding his contention that the order was unconstitutional, decided that the organizer was within his rights in disobeying the decree of the Court. *Thomas* v. *Collins*, 323 U. S. 516, 536 (1946).

Nor does the statute here provide any remedy by which the appellant could judicially test the validity of the process served upon him. Compare, *Yakus* v. *United States*, 321 U. S. 414, 437 (1944). Under these circumstances, to deny him his constitutional defenses to this criminal prosecution would be a deprivation of his liberty without due process of law.

III

The issue of judicial participation in the violation by Congress of Section 2 of the Fourteenth Amendment.

Here, again, the Government declines to meet the issue (p. 9). More important, the Government misstates the issue. The issue here is not the failure of Congress to exercise the power conferred upon it by Section 2 of the Fourteenth Amendment. The real issues are presented in the petition herein (pp. 15-16) to which this Court is respectfully referred. The issue is whether the judicial arm of government may become a party to a patent violation of Section 2 of the Fourteenth Amendment by the positive action of imprisoning the person who raises the issue. The issue is whether a person in jeopardy of his liberty through a charge of contempt of a committee partly composed of men seated in Congress in violation of Section 2

of the Fourteenth Amendment can be denied before the Court trying him for his freedom, the opportunity to offer proof that the Committee is without lawful authority; whether there exists no element of due process that may be claimed in court by a person against whom a Congressional committee so constituted demands criminal penalties.

The Government's claim that the issue is "political" and "collateral" is answered in our petition and brief (pp. 23-25, 43-51). The petitioner in the Trial Court was not attacking the apportionment of representatives as a member of the public at large. He was being subjected to an immediate, a direct, a present injury resulting from the violation of the Constitution. He was being subjected to criminal prosecution and he faced a present threat to his liberty. There was nothing "collateral" or "political" about the issue as it was presented to the Trial Court. In refusing the petitioner any opportunity to present proof to the jury that the Committee on Un-American Activities was without lawful authority to demand criminal penalties against the petitioner, the Trial Court gave judicial approval to the nullification of Section 2 of the Fourteenth Amendment and the imprisonment of the person who had raised the question. We submit that this was error, as was the decision of the Court of Appeals upholding the ruling of the Trial Court, a decision to which the Government understandably does not refer. For the latter decision encourages the continued monstrous nullification of the Fourteenth Amendment in asserting that Congress may with impunity ignore the provisions of Section 2.

IV

The issue of wilfulness and the exclusion from the evidence of petitioner's explanation for his non-appearance.

The Government's reliance upon *Fields* v. *United States*, 164 F. 2d 97 (App. D. C.), cert. den. 332 U. S. 851, appears misplaced. The authorizing statute there did not involve, as it does here, a vague and undefined power to inquire broadly into propagation of ideas (see the discussion in petition and brief, pp. 23, 36-38).

The Government attempts to justify the exclusion from the evidence of petitioner's explanation for his non-appearance by stating, first, that it "was not really an excuse for non-attendance; it was in reality a challenge to the legality of the Committee" (p. 11), and, second, that under the construction of the term "wilful" by the Trial Court, the "letter was clearly irrelevant" (p. 11). Were we to concede the premises upon which the Government bases its arguments, its contentions must nevertheless fail. Even under the most narrow construction of the word "wilful", the petitioner's explanation for his non-appearance was clearly relevant. The Government charged that the petitioner had wilfully defaulted in appearance before a lawfully constituted committee. The petitioner asserted in his communication that he had no intention "to ignore the authority of any lawful congressional body" (R. 396). It was his intention to challenge the authority of an unlawfully constituted body. Whether his *intention* was to ignore the authority of a lawful body, or to challenge the authority of an unlawful group, was an issue for the jury to decide, and upon that issue, his written explanation was clearly material and relevant.

V

The issue of the service of the subpoena.

The Government fails to distinguish the case of *Wilder* v. *Welsh*, 1 MacArthur 566 (Sup. Ct. D. C.), relied upon by the petitioner, nor does it reply to the arguments contained in his petition and brief (pp. 19-20, 38-39). *In re Hall*, 296 Fed. 780 (S. D. N. Y.), cited by the Government in its brief (p. 13), is contrary to its position. Article I, Section 5 of the Constitution deals only with the power of each House to compel members to attend its sessions when less than a quorum is present. *Norris* v. *Hussler*, 23 Fed. 581 (C. C. D. N. J.), is not in point. Petitioner was not subpoenaed to testify in the same matter as to which he was already in attendance. The importance of a ruling by the Court on this question is enhanced by the increased utilization of Congressional committees as roving investigatory bodies.

VI

The Government's avoidance of the other issues raised in the petition.

There is one basic issue which the Government appears studiously to have avoided in this proceeding. The issue is embodied in Questions 9 and 10 in the petition (p. 14) and in the subsequent discussion (pp. 22-23, 35-36). The petitioner was not afforded the elements of a judicial trial. His counsel was permitted to make no opening statement; he was not permitted to cross-examine; all the pertinent evidence which he offered to prove was rejected; virtually all his prayers for instructions were denied. There was here complete deprivation of liberty without due process of law. Upon an issue of such magnitude, the Government has no comment.

CONCLUSION

On this application, counsel have intentionally refrained from commenting upon the obvious infirmities in the opinion of the Court below with respect to the legal acumen displayed to lack of judicial disinterestedness revealed in the gratuitous comments upon the personality of the defendant and the arguments of counsel and the general tenor and ungrammatical and unrhetorical presentation of the opinion of the Court. Counsel advert to this only that they may not be accused of having overlooked these weaknesses in the Court's opinion. On the contrary, counsel have limited themselves solely to the basic questions involved in the prosecution and the decision of the lower Court.

The Government does not deny that the decision of the Court of Appeals involves important questions of federal law which have not been but should be settled by this Court. It does not deny that the questions raised are ones of substance and general importance. The prayer for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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